No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY, SEWELL L. AVERY, OLIVER M. KNODE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on November 7, 1949. A petition for appeal is presented to the district court herewith, to wit, on January 6, 1950.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Associated Press, Inc. v. *United States*, 326 U. S. 1;
United States v. *U. S. Gypsum Co.*, 333 U. S. 364.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING BELOW

This is a civil proceeding brought by the United States under Section 4 of the Sherman Act charging six corporations and seven individuals with conspiring to fix prices on patented gypsum board and unpatented gypsum products, and otherwise to restrain and monopolize interstate commerce in such goods, in violation of Sections 1 and 2 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended, and a three-judge district court was appointed. On April 20, 1944, at the close of the presentation of the Government's evidence, the defendants moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure upon the ground that the Government had shown no right to relief. The district court subsequently held that this motion should be granted, and in August 1946 it filed findings of fact and conclusions of law and entered judgment dismissing the complaint.

On appeal, the judgment of dismissal was reversed and the case was remanded for further proceedings in conformity with the Court's opinion. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364. The district court was held to have erred in its interpretation of *United States* v. *General Electric Co.*, 272 U. S. 476, in concluding that the Government's evidence failed to show violation of the Sherman Act, and in certain of its findings of fact.

Following such remand, the Government requested a pre-trial conference to determine what factual issues remained for trial and what categories of evidence the defendants intended to adduce. At a hearing on this matter the district court requested that the Government file a motion for summary judgment and that the defendants file a

proffer of proof, in order that the court might thereby have a basis for making a ruling on the future course of the proceeding. After such motion and such proffer had been filed and after argument thereon, the district court ruled on June 29, 1948, that the proof which the defendants proffered gave rise to no genuine issue as to any fact material to an adjudication that the defendants had violated the Sherman Act, and that the Government's motion for summary judgment should be granted.[1] Judge Stephens dissented from these rulings. The opinions of Judges Garrett and Jackson as orally delivered on June 29, 1948, and the dissenting opinion of Judge Stephens as revised and filed on November 7, 1949, are annexed to this Statement.

The Government and defendant U. S. Gypsum each submitted proposed findings of fact and conclusions of law and a proposed decree. On November 7, 1949, the court, without making findings of fact or conclusions of law or rendering an opinion, entered a final decree, a copy of which (together with Judge Stephens' dissent therefrom) is attached to this Statement. The material provisions of this decree, which in substance are those which defendant U. S. Gypsum had proposed, may be summarized as follows:

The "defendant companies" are adjudged to have violated Sections 1 and 2 of the Sherman Act (Art.

[1] The Government's motion prayed for summary judgment in its favor, or, if such judgment should not be rendered on the whole case or for all the relief asked and a further trial should be necessary, that the court ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just. See Rule 56(d) of Federal Rules of Civil Procedure.

III).[2] Each such defendant is enjoined from agreeing with any defendant for the purpose or with the effect of continuing or reviving "any monopolistic practice," and from agreeing with any defendant "in restraint of" interstate commerce in gypsum board in the eastern territory of the United States "by license agreements to fix, maintain or stabilize prices" or terms of sale of gypsum board (Art. V, pars. (2), (3)). Each patent license agreement between defendant U. S. Gypsum and any other defendant in effect at the time the complaint in this case was filed (August 15, 1940) is declared null and void (Art. IV) and further enforcement is enjoined (Art. V, par. (1)). Judgment for 50% of the taxable costs of the proceeding is entered against the "defendant companies" (Art. X).

Defendant U. S. Gypsum is required to grant to "each applicant therefor within 90 days after the effective date hereof" a non-exclusive license under any or all of the gypsum board patents presently owned by U. S. Gypsum, at a royalty not in excess of the royalty on the same article or process fixed in the license agreements which the decree outlaws (Art. VI, par. 1). U. S. Gypsum may satisfy this obligation by tendering a license agreement containing the terms and conditions set forth in the forms of license agreement which the court "hereby approved" and "ordered filed herein" (Art. VIII). Since the approved forms of agreement cover only the patents licensed under the agreements which the decree strikes down, it is clear that U. S. Gyp-

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[2] "Defendant companies" are defined as the six corporate defendants plus Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Art. II, par. 1).

sum's obligation to license is confined to these patents.[3]

THE QUESTIONS ARE SUBSTANTIAL

We submit that the district court's decree patently fails to provide effective safeguards against continuation or renewal of defendants' noncompetitive pricing practices. Under the leadership of a dominant member of the industry, U. S. Gypsum, defendants have engaged in an elaborate, industry-wide program to eliminate price competition in the sale of gypsum board. They have, in carrying out this program, suppressed the production of competitive unpatented products, stabilized prices on such products, and squeezed out a class of distributors. See *United States* v. *U. S. Gypsum Co.*, *supra*, at p. 400.

For all practical purposes, the decree does no more than terminate the provisions of existing license agreements which authorize U. S. Gypsum to fix its licensees' sales prices. The injunctive provisions of paragraph (2) of Article V are phrased in such general terms that the proof requisite to establish a violation would approximate the proof required to establish a violation of the Act itself. The injunctive provisions of paragraph (3) of Article V are confined to restraints effected by license agreements. They therefore would not apply to price fixing activities carried on through some other medium, such as a trade association, nor would they apply to concerted action to control or stabilize prices of gypsum products.

Where trade has been illegally restrained or monopolized through a misuse of rights claimed under patents, the courts have recognized that, in order to

[3] This conclusion is supported by the decree's definition of the words "patents" and "patent licenses" (Art. II, pars. 2, 4).

dissipate the effects of the illegal conduct, the patentee should be required to make his patents available, on reasonable terms, to anyone wishing to use them. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 419; *United States* v. *National Lead Co.*, 332 U. S. 319, 336-337, 348-349. While the present decree provides for licensing "any applicant," the 90-day time limitation on this requirement makes it a practical nullity as far as any newcomer to the business is concerned. The serious business and patent questions involved in embarking upon manufacture of gypsum board can hardly be determined within 90 days after the decree becomes effective.

The decree tends to enhance U. S. Gypsum's existing dominant position in the industry. Its licensees have not previously been concerned with the validity or scope of U. S. Gypsum's patents, and are thus at an obvious disadvantage in bargaining with U. S. Gypsum as to the terms of new license agreements. The decree, instead of providing for a third-party determination of disputed provisions of such agreements, permits a royalty rate as high as that under the corresponding outlawed agreement, and permits U. S. Gypsum to adopt the other provisions of the forms of agreement approved by the court. The form applicable to U. S. Gypsum's most important patents requires the licensee to report to U. S. Gypsum monthly the "quantity" of gypsum board manufactured under the licensed patents and the "selling price" thereof, and permits U. S. Gypsum to inspect the licensee's records, either directly or through a certified public accountant. U. S. Gypsum thus has the competitive advantage of exact information as to its competitors' sales and prices. In addition, the furnishing

of such information would strongly militate against competitive pricing or sales expansion by any licensee, because of fear of possible reprisals by U. S. Gypsum.

Since some of the individual defendants, particularly defendant Sewell L. Avery, were the principal architects of the acts and conduct held to be illegal, the Government seems plainly entitled to an adjudication that these defendants violated the statute, and to have the injunctive provisions of the decree run against them. Another question of error which the appeal presents is failure to impose upon the defendants the full taxable costs of the proceeding. See *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (C.A. 7).

The district court appears to have been of the opinion that the defendants in good faith believed that their conduct was within rights given by the patent law and to have concluded that in these circumstances the court, insofar as it was free to exercise discretion, should enter a decree as painless to the defendants as possible. The validity of this novel theory is a question of substance which the appeal presents.

Another question of substance which the appeal will present is whether, when summary judgment is entered against the defendants in a proceeding under the Sherman Act, the usual rule prevails that the judgment should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by "untraveled roads" to the same end, and that it will "effectively pry open to competition a market that has been closed by defendants' illegal restraints." See *International Salt Co.* v. *United States*, 332 U. S. 392, 400-402.

We submit that the various deficiencies in the decree to which we have referred present questions of undoubted substance. In many civil proceedings under the Sherman Act, the adequacy of the relief granted is of critical and even central importance. In numerous appeals from judgments entered in such cases, the adequacy or appropriateness of the relief granted by the trial court has presented an issue of more general importance, and one which was more sharply disputed, than the question of substantive violation of the statute. *Crescent Amusement Co.* v. *United States*, 323 U. S. 173; *United States* v. *National Lead Co.*, 332 U. S. 319; *Paramount Pictures, Inc.* v. *United States*, 333 U. S. 131. The basic issue which this appeal presents is, in short, whether "the Government has won a lawsuit and lost a cause." See *International Salt* case, *supra*, at p. 401.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 6, 1950.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY, ET AL.,
DEFENDANTS

GARRETT, J.: I have studied the proffers of proof very carefully in the light of the motion for summary judgment and in the light of the argument made in the briefs.

It is my opinion that if everything should be testified to, which is in the proffers of proof, it would not bring any change in the decision of the Supreme Court on the fundamental question involved.

I do not care to go into any detail about the matter. Of course it is very well known my judgment was different originally, but the Supreme Court has spoken, and I am unable to see wherein there is any loophole through which there may be a conclusion different from that reached by the Supreme Court upon the fundamental questions.

Hence, I think the summary judgment should be granted, but I take the precaution to say that the decree following the summary judgment, if it comes or when it does come, must be examined with great care because it should not include matters which were not in issue before the Supreme Court.

That, I think, is all that I have to say.

JACKSON, J.: Judge Garrett's reasoning parallels mine. I, too, feel that if everything were proved by witnesses on the stand that is stated would be attempted to be proved in the offer of proof, that still there would be no genuine issue of a material fact. There is no sense in going to great length to explain my view. I agree with Judge Garrett. I have read very carefully the briefs, listened with

attention and an open mind to the arguments, but I just can't understand how I could come to any other conclusion in view of the decision of the Supreme Court.

STEPHENS, J.: I think that the entry of a summary judgment against the defendants is not warranted. The case was before the Supreme Court for review of the correctness of the trial court's mid-trial dismissal, under Rule 41 (b), Federal Rules of Civil Procedure, of the Government's complaint. The dismissal was after the Government had completed presentation of the evidence which it relied upon to sustain the charges in its complaint, but before any evidence had been presented by the defendants. As I read its opinion the Supreme Court determined that the Government's evidence established *prima facie* the violations of the Sherman Act, or some of them, charged in the Government's complaint. But these charges—outlined in paragraphs 44-46(a) inclusive, and detailed in paragraphs 47-123 inclusive, of the complaint are denied by the defendants' answers.[4] Hence there

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[4] The charges reduce themselves in essence to the following: (1) That the license contracts entered into between the defendant USG, as licensor, and the other defendants, as licensees, are themselves illegal as in restraint of trade in view of the nature of the patents upon which the contracts are based, in view of the fact that USG and the plurality of defendant licensees manufacture all of the gypsum board in the "Eastern area," and in view of the terms and conditions of the contracts, including those providing for the establishment of minimum prices on patented gypsum board to be made and sold by the defendants. (2) That the license contracts, even if valid on their face, were not entered into as bona fide license agreements, reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were executed by the defendants merely to give color of legality to a combination to restrain trade, by control of the prices and terms and conditions of sale of gypsum board, plaster, and miscellaneous gypsum products throughout the gypsum industry. (3) That the defendants' operations were carried beyond the proper limits of a patent monopoly and licensing thereunder by raising and fixing at arbitrary and non-competitive levels the price of gypsum board made and

remain in the case genuine issues of material fact. This forbids the entry of a summary judgment for under Rule 56 (c), Federal Rules of Civil Procedure, such a judgment can be rendered only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." And I think that in setting aside the trial court's findings of fact and in saying that "By the record *now presented*" violation of the Sherman Act is clear and in saying that, as the order of dismissal came at the end of the Government's presentation on defendants' motion to dismiss under Rule 41 (b), "the order is reversed and the case remanded *for further proceedings in conformity with this* opinion,"[5] the Supreme Court meant that the defendants' evidence should be heard and the case disposed of by the trial court upon the merits on the issues raised by the complaint and the answers and upon findings of fact and conclusions of law to be made anew after a weighing of all of the evidence, *i.e.*, that to be presented by the defendants as well as that which has been introduced by the Government. It is in my view not to be thought that the Supreme Court contemplated denial to the defendants of their day in court upon the issues raised by the pleadings. But that is the effect of the summary judgment; the defendants have made offers of proof but they are not to be permitted to present evidence. It is

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sold by the defendants by improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented materials—plaster and miscellaneous gypsum products—by effectuating improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and by fixing the prices at which manufacturing distributors resold gypsum board. (4) That the patents, or some of them, upon which such license agreements were purportedly based are invalid.

[5] *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 401, 402 (1948); italics supplied.

true that it is without dispute in the case that patent licenses with price fixing limitations were executed by the defendants, that these licenses were, in the large, adhered to by each defendant with knowledge of the adherence of others, and that they were industry wide; and these undisputed facts were adverted to by the Supreme Court in the course of its opinion ruling that a *prima facie* case of conspiracy to violate the Sherman Act had been made out by the Government. But I do not read the opinion of the Court as ruling that such a plurality of patent licenses is, without more, conclusive, rather than merely *prima facie*, evidence of a violation of the Sherman Act. Had the Court regarded such a plurality of licenses, without more, as conclusive evidence of a violation of the Act it would I think have overruled *United States* v. *General Electric Company*, 272 U. S. 476 (1926). This it did not do either in its decision in the instant case or in *United States* v. *Line Material Co.*, 333 U. S. 287 (1948). In the latter case the Sherman Act violation found by the Supreme Court was laid by it to the cross-licensing of the Lemmon and Schultz patents, not to the admitted plurality of licenses with price fixing provisions entered into, as the Court said, as the result of arm's length bargaining although with knowledge on the part of each licensee of price provisions in the licenses of others.

I think therefore that the defendants should be permitted to present their offered proof on the issues of fact raised by their answers to the Government's complaint and that the court should then hear argument by counsel for the parties and should, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and then render judgment according thereto.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; AND FREDERICK TOMKINS, DEFENDANTS.

PRELIMINARY STATEMENT

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the

Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J., and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

DECREE

The motion of plaintiff for a summary judgment is sustained and in conformity with the decision of the Supreme Court, as understood by the majority of this Court, and in obedience to its mandate, it is ordered, adjudged and decreed:

ARTICLE I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint

states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

ARTICLE II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor,

and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (perforated lath), and any supplement or amendment to any of said patent license agreements.

ARTICLE III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

ARTICLE IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-

trust laws of the United States and illegal, null and void.

ARTICLE V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from

(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;

(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice.

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof.

ARTICLE VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within 90 days after the effective date hereof, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty on the same article or process fixed in the license agreements set out in Article II hereof.

2. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

ARTICLE VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this decree.

ARTICLE VIII

The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to each applicant for a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of Article VI.

ARTICLE IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction

or carrying out of this decree, and (2) for the enforcement of compliance therewith.

ARTICLE X

Judgement is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company	55%
National Gypsum Company	23%
Certain-teed Products Corporation	11%
The Celotex Corporation	3%
Ebsary Gypsum Company, Inc.	3%
Newark Plaster Company	4%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	1%

Let the decree be entered.

(S.) FINIS J. GARRETT,
FINIS J. GARRETT, J.
(S.) JOSEPH R. JACKSON,
JOSEPH R. JACKSON, J.

STEPHENS, *J.*, dissents from the entry of a summary judgment against the defendants. In his view the defendants should be permitted to present their offered proof upon the issues of fact raised by their answers to the Government's complaint, and the court should then hear argument from counsel for the parties and, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and render judgment according thereto.

(S.) HAROLD M. STEPHENS,
HAROLD M. STEPHENS, J.

Dated: NOVEMBER 7, 1949.

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